OAH Docket No. 11-1300-18013-1
Governor's Tracking No. AR 307

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF EDUCATION

In the Matter of the Proposed Amendments to Rules Governing Infant and Toddler Intervention Services and Special Education Criteria for Children Ages 3-6, *Minnesota Rules, parts 3525.1350 and 3525.1351*.

REPORT OF THE ADMINISTRATIVE LAW JUDGE

Administrative Law Judge Barbara L. Neilson conducted a hearing concerning the above rules beginning at 10:00 a.m. on May 31, 2007, in the Mississippi Room of the Minnesota Department of Health Snelling Office Park Building, 1645 Energy Park Drive, St. Paul, Minnesota. The hearing continued until all interested persons, groups and associations had an opportunity to be heard concerning the proposed rules.

The hearing and this Report are part of a rulemaking process governed by the Minnesota Administrative Procedure Act.[1] The legislature has designed the rulemaking process to ensure that state agencies have met all of the requirements that Minnesota law specifies for adopting rules. Those requirements include assurances that the proposed rules are necessary and reasonable; that they are within the agency's statutory authority; and that any modifications that the agency may have made after the proposed rules were initially published are within the scope of the matter that was originally announced.

The rulemaking process includes a hearing when a sufficient number of persons request that a hearing be held. The hearing is intended to allow the agency and the Administrative Law Judge reviewing the proposed rules to hear public comment regarding the proposed rules. The Administrative Law Judge is employed by the Office of Administrative Hearings (OAH), an independent state agency that is not affiliated in any way with the Department of Education (referred to as "the Department" or "the Agency") or any other state agency.

The members of the Department of Education's hearing panel were Kathryn Olson, Rulemaking Coordinator for the Department of Education; Alice Seagren, Commissioner of the Department of Education; Marty Smith, Statewide Coordinator for the Department of Education's Infant and Toddler Intervention Program; John Hurley, Manager of the Minnesota Children with Special Health Needs Program of the Department of Health; and Ralph McQuarter, Director of Community Capacity and Planning in the Child Safety and Permanency Division of the Department of Human

[1] Minn. Stat. §§ 14.131 through 14.20.

Services. Approximately 35 people attended the hearing. Eighteen members of the public signed the hearing register and six members of the public spoke at the hearing, in addition to the Department's panel members.

The Department of Education received written comments on the proposed rules before the hearing. After the hearing, the record remained open for five business days, until June 7, 2007, to allow interested persons and the Department an opportunity to submit written comments. Following the initial comment period, the record remained open for an additional five business days to allow interested persons and the Department the opportunity to file a written response to the comments submitted. The OAH hearing record closed on June 14, 2007. All of the comments received were closely read and thoroughly considered.

SUMMARY OF CONCLUSIONS

The Department of Education has established that it has the statutory authority to adopt the proposed rules and that the proposed rules are necessary and reasonable. In addition, the Department has shown that modifications made to the proposed rules during this rulemaking proceeding do not result in rules that are substantially different than the rules as originally proposed.

Based upon all the testimony, exhibits and written comments, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Regulatory Framework and Nature of the Proposed Rules

1. This rulemaking proceeding involves revisions to the rules governing infant and toddler intervention services and special education eligibility criteria for children ages three through six.

2. The Department of Education, along with the Department of Human Services and the Department of Health, first committed to providing special education to children from birth through age two in 1984.[2] In 1987, Minnesota began accepting federal funds to implement services to these children under what was then Part H of the Individuals with Disabilities Education Act (IDEA), and the federal program was integrated with the special education system already in place in the state. In 1988, special education and related services were made available to all eligible children in Minnesota, beginning at birth, and, in 1994, Minnesota fully implemented the federal system under Part H.[3]

3. Under Minnesota's approach, the Minnesota Departments of Education, Health, and Health and Human Services offered Part H-related services to children who: (A) met the criteria of a disability category under Part B of IDEA (which governs

[2] Exhibit 3 (SONAR) at 1.
[3] SONAR at 1.

services for children ages three to 21); (B) had a condition known to hinder normal development and demonstrated a need for services; and (C) exhibited an overall delay in development.[4]

4. In 2004, IDEA was amended by Congress. The former Part H was incorporated into a new Part C in the IDEA as amended. Part C contains the requirements for children ages birth through age two; Part B contains the requirements for children ages three through 21. The eligibility requirements for Part B are more stringent than those under Part C. Early intervention for a broader group of children is emphasized under Part C.[5] In contrast, Minnesota's eligibility criteria for the youngest children served under Part C (birth through age two) was designed to be similar to the criteria for older children served under Part B, in keeping with its "seamless" approach to the provision of the full range of special education services for those from birth through age 21.[6]

5. In 2004, after a monitoring visit, the Office of Special Education Services (OSEP) of the United States Department of Education informed the Department that it would have to change its eligibility criteria for children ages birth through age two to conform to federal law and remain eligible for federal funds under Part C.[7] OSEP informed the Department that its current system excludes a small number of children who would meet Part C eligibility requirements, but do not meet Part B eligibility requirements. OSEP further indicated that Minnesota must bring its Part C eligibility requirements into compliance by June 30, 2007, or risk the loss of its Part C federal funds.[8]

6. Part C of IDEA provides that infants and toddlers are eligible to receive services if they show a developmental delay in at least one area of development, or if they have a medical syndrome or condition that has a high probability of resulting in developmental delay regardless of whether they demonstrated a need for services. Those criteria are less stringent than Minnesota's existing criteria for infants and toddlers.[9]

7. Under the proposed rules, a larger group of children will be eligible to participate in Minnesota's existing early childhood special education system. The Department has indicated that "[t]hese children will receive all of the services that they need, as currently provided for in Minnesota statutes." The expanded eligibility requirements are designed to bring Minnesota into compliance with federal law and regulations, and preserve Minnesota's Part C-related federal funding.[10]

8. In addition to the relaxed eligibility criteria, the proposed rules also include a new subpart 4 that describes the necessary requirements of an evaluation to determine an infant or toddler's eligibility for intervention services. Some of these

[4] Minn. R. 3525.1350, subp. 2; SONAR at 1.
[5] SONAR at 1-2, 10.
[6] SONAR at 10.
[7] SONAR at 1-2, 11; Hearing Transcript at 13-14.
[8] SONAR at 2.
[9] SONAR at 1-2.
[10] SONAR at 2.

evaluation requirements are contained in portions of the current rules that primarily relate to eligibility criteria. Other requirements are proposed to be added to ensure compliance with federal IDEA Part C provisions. The proposed rules also contain a new subpart 5 that addresses the transition of a child before the child's third birthday from infant and toddler intervention services to early childhood special education or other appropriate community-based services. The Department also proposes to discuss only Part C services in rule part 3525.1350 and move the Part B eligibility criteria for children ages three through six to a separate new rule part.

9. The Department convened an advisory committee which met over a period of several months. The committee advised the Department about various issues involved with the rule amendments. In March 2007, the Department held four informal public meetings around the state and presented a draft of the proposed rules to parents, educators, and other interested parties. The Department also published a Request for Comments in the State Register and received 14 comments from the public. Many of the comments received by the Department were supportive of the rule changes, while others suggested specific changes. The Department has incorporated some of these suggested changes in the proposed rules. Some individuals who made comments expressed concerns about costs and the availability of resources. The Minnesota Legislature has responded to some of those cost concerns by allocating funding for the provision of services to the additional children who will be eligible under these proposed rule changes.[11]

Procedural Requirements of Chapter 14

10. On February 26, 2007, the Department published a Request for Comments on Possible Amendments to Rules Governing Early Childhood Special Education Eligibility. The Request indicated that the Department was considering rule amendments that expand eligibility for early intervention services for children ages birth up to age three, to include children with a developmental delay in one area and children with a diagnosed condition that has a high probability of resulting in developmental delay. The Request for Comments was published at 31 State Register 1168.[12]

11. By letter dated April 20, 2007, the Department requested that OAH schedule a hearing and assign an Administrative Law Judge. The Department also filed a proposed Notice of Hearing, a copy of the proposed rules, and a draft of the Statement of Need and Reasonableness (SONAR). By letter dated April 26, 2007, the Administrative Law Judge approved the Department's Notice of Hearing.

12. On April 27, 2007, the Department mailed the Notice of Hearing to all persons and associations who had registered their names with the agency for the purpose of receiving such notice and to all persons identified in the additional notice plan. The Notice of Hearing stated that a copy of the proposed rules was attached to the notice.[13]

[11] SONAR at 3; Hearing Transcript at 62-64.
[12] Ex. 1.
[13] Exs. 5-7.

13. On April 27, 2007, the Department sent a copy of the Notice of Hearing and Statement of Need and Reasonableness to the legislators specified in Minn. Stat. § 14.116.[14]

14. On April 27, 2007, the Department mailed a copy of the Statement of Need and Reasonableness to the Legislative Reference Library.[15]

15. On April 30, 2007, the proposed rules and the Notice of Hearing were published at 31 State Register 1473.[16]

16. On the day of the hearing the following documents were placed in the record:

- Request for Comments published in the State Register on February 26, 2007, at 31 SR 1168 (Ex. 1);
- Proposed rule with Revisor's approval dated April 23, 2007 (Ex. 2);
- Statement of Need and Reasonableness (SONAR) (Ex. 3);
- Certificate of Mailing the SONAR to the Legislative Reference Library dated April 27, 2007 (Ex. 4);
- Notice of Hearing as mailed and as published in the State Register on April 30, 2007, at 31 SR 1473 (Ex. 5);
- Certificate of Mailing the Notice of Hearing to the Department's rulemaking mailing list dated April 27, 2007, and Certificate of Accuracy of the Mailing List (Ex. 6);
- Certificate of Giving Additional Notice on April 26, 2007 (U.S. mail) and April 30, 2007 (email) (Ex. 7);
- Written comments on the proposed rules received by the agency after publication of the Notice of Hearing (Ex. 8);
- Certificate of Sending the Notice and SONAR to Legislators on April 27, 2007 (Ex. 9);
- Non-Substantive Change to Proposed Rule 3525.1350 (Ex. 10);
- Memo to Judge Neilson regarding the fiscal impact of the proposed Part C rule changes (Ex. 11);
- Written comments from agency panel members (Exs. 12-14); and
- Written comments from members of the public submitted during the hearing (Exs. 15 and 16).

[14] Ex. 9.
[15] Ex. 4.
[16] Ex. 5.

Additional Notice

17. Minnesota Statutes Sections 14.131 and 14.23, require that the SONAR contain a description of the Department's efforts to provide additional notice to persons who may be affected by the proposed rules. The Department submitted an additional notice plan to the Office of Administrative Hearings. This plan was reviewed and approved by letter dated April 26, 2007.

18. In addition to notifying certain members of the Legislature and those persons who had earlier requested notice of rulemaking proceedings under Minn. Stat. § 14.14, the Department also provided notice to the following groups and individuals by either U.S. mail sent on April 26, 2007, or email sent on April 30, 2007:

- Education organizations;
- Advocates/Attorneys;
- Minnesota superintendents;
- Early childhood special education coordinators;
- Interagency Early Intervention Committee (IEIC) chairs;
- Local county public health and social service administrators;
- Governor's Interagency Coordinating Council (ICC) members;
- Advocacy organizations;
- Early childhood family education coordinators;
- Head Start representatives;
- Early Childhood Special Education Higher Education Consortium;
- Medical community, including NICU directors, children's rehabilitation hospitals, and the Minnesota Chapter of the Academy of Pediatrics; and
- Other interested parties.[17]

The Department also posted the Notice of Hearing, the proposed rules, and the SONAR on its internet website.

19. The Administrative Law Judge finds that the Department provided notice in accordance with its Additional Notice Plan.

Impact on Farming Operations

20. Minnesota Statutes Section 14.111 imposes an additional requirement calling for notification to be provided to the Commissioner of Agriculture when rules are proposed that affect farming operations. In addition, where proposed rules affect farming operations, Minnesota Statutes Section 14.14, subd. 1b, requires that at least one public hearing be conducted in an agricultural area of the state.

[17] Ex. 7.

21. Because the proposed rules do not impose restrictions or have a direct impact on fundamental aspects of farming operations, the Administrative Law Judge finds that no additional notice is required under Minn. Stat. § 14.111, and that no public hearings need to be conducted in agricultural areas under Minn. Stat. § 14.14.

Statutory Authority

22. The Department is authorized to adopt these rules pursuant to Minnesota Statutes Section 125A.07(a). That statute directs the Commissioner of Education, in consultation with the Departments of Health and Human Services, to "adopt permanent rules for instruction and services for children under age five and their families. These rules are binding on state and local education, health, and human services agencies. The commissioner must adopt rules to determine eligibility for special education services."

23. The Administrative Law Judge finds that the Department has the statutory authority to adopt the proposed rules.

Regulatory Analysis in the Statement of Need and Reasonableness (SONAR)

24. The Administrative Procedure Act requires an agency adopting rules to consider seven factors in its Statement of Need and Reasonableness.[18] The first factor requires:

> **(1) A description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule.**

The Department states that the classes of affected parties will include children who are eligible for the Part C-related services and their parents; school districts; and county public health and social services agencies. In addition, the Minnesota Departments of Education, Health, and Human Services will be affected to the extent that they provide field training, technical assistance, and enforcement oversight to local providers.[19] All of these classes of persons will also benefit from the proposed rules.

The three Minnesota Departments, as well as school districts and local county public health and social services agencies, will bear the costs of the proposed rules. Further discussion of the benefits and costs of these proposed rules is contained in the SONAR.[20]

[18] Minn. Stat. § 14.131.
[19] SONAR at 4.
[20] *Id*. at 4-5.

(2) The probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues.

The Department indicates in the SONAR that probable costs to be incurred by the Department of Education include staffing expenses associated with support services such as ongoing training and technical assistance, guidance, oversight, and enforcement given to local providers. The Department estimates that the probable costs to the Departments of Health and Human Services will be minimal and similar in nature to the Department of Education's costs.[21] The Department does not anticipate any effect on state revenues.

(3) A determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule.

The Department asserts that there are no less costly or less intrusive methods for achieving the purpose of the proposed rules. As discussed below, the Department did consider an alternative approach called the "two-door model," but ultimately found that such a model would have required significant new infrastructure within the state agencies as well as within local agencies and between agencies.[22]

(4) A description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule.

The "two-door model" initially considered by the Department would have kept the existing special education services intact. Under this approach, children who were eligible under the current rule would continue to be evaluated and receive early childhood special education, which includes a free appropriate public education (FAPE), while children who are not eligible under Minnesota's current eligibility criteria (because they have a delay in only one area of development or a medically diagnosed syndrome or condition that is known to hinder normal development without a demonstrated delay in development) would be eligible for early childhood intervention, but not for FAPE. Adoption of the "two-door model" would have necessitated statutory changes and the development of new systems of delivery, payments, reporting, and enforcement at both the state and local levels. Significant costs would have been associated with that approach, and the Department determined that the proposed rules would better maintain the high quality of Minnesota's special education system. The SONAR contains additional discussion of the "two-door model" and why the Department rejected it in favor of the proposed rules.[23]

[21] *Id*. at 5.
[22] *Id*. at 5-6.
[23] *Id.* at 6-7.

(5) The probable costs of complying with the proposed rules, including the portion of the total costs that will be borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses or individuals.

The Department projects that the average yearly cost per newly-eligible child will be $2,500, and estimates that the probable costs of complying with the proposed rules will be approximately $1,940,000 in fiscal year 2008; $3,137,500 in fiscal year 2009; $4,087,500 in fiscal year 2010; and $5,275,000 in fiscal year 2011. The Department noted in the SONAR that its current budget forecast included funding for the projected cost increase, and it was anticipated that the Legislature would provide funding during the 2007 session.[24] The Department reported at the hearing that new legislation was enacted just prior to the hearing that did, in fact, increase the level of special education categorical funding. This legislation is discussed in further detail in the funding discussion at the end of this Report.

The Department also emphasized that, if these rule changes are not promulgated, the State stands to lose over $6.8 million in federal funding per year to support the Part C system.[25]

(6) the probable costs or consequences of not adopting the proposed rule, including those costs borne by individual categories of affected parties, such as separate classes of governmental units, businesses, or individuals.

According to the Department, if these proposed rule amendments are not adopted, the consequence will be loss of federal Part C funding. This will cost the State of Minnesota approximately seven million dollars in funding for services and infrastructure, including child find services to help identify children who may need or qualify for infant and toddler intervention services; coordination services provided for families; interagency infrastructure; and respite services for families of children who receive infant and toddler intervention services.[26] Families who lose out on these intervention services for which their children would be newly eligible would have to find ways of locating, securing, and paying for alternate intervention services or simply go without these services.[27]

(7) An assessment of any differences between the proposed rules and existing federal regulation and a specific analysis of the need for and reasonableness of each difference.

The Department asserts that the proposed rules will bring Minnesota's rules into compliance with existing federal statutes and regulations, as they are interpreted by OSEP.[28]

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[24] *Id.* at 7.
[25] Department's Post-Hearing Submission at 6.
[26] *Id.* at 7-8.
[27] *Id.* at 8.
[28] *Id.*

Performance-Based Rules

25. The Administrative Procedure Act[29] also requires an agency to describe how it has considered and implemented the legislative policy supporting performance based regulatory systems. A performance based rule is one that emphasizes superior achievement in meeting the agency's regulatory objectives and maximum flexibility for the regulated party and the agency in meeting those goals.[30]

26. The Department states in its SONAR that the proposed rules are performance-based because they set forth a limited number of requirements, all of which are mandated by the 2004 changes to IDEA, and some of which are flexible in that providers can demonstrate their ability to comply with the requirements in various ways.[31]

Consultation with the Commissioner of Finance

27. Under Minn. Stat. § 14.131, the agency is required to "consult with the commissioner of finance to help evaluate the fiscal impact and fiscal benefits of the proposed rule on units of local government."

28. The Department consulted with the Commissioner of Finance regarding the proposed rules by sending the Commissioner copies of the proposed rules and SONAR. The Department of Finance had no comments.[32]

29. The Administrative Law Judge finds that the Department has met the requirements set forth in Minn. Stat. § 14.131 for assessing the impact of the proposed rules, including consideration and implementation of the legislative policy supporting performance-based regulatory systems.

Analysis Under Minn. Stat. § 14.127

30. Effective July 1, 2005, under Minn. Stat. § 14.127, the Department must "determine if the cost of complying with a proposed rule in the first year after the rule takes effect will exceed $25,000 for: (1) any one business that has less than 50 full-time employees; or (2) any one statutory or home rule charter city that has less than ten full-time employees."[33] The Department must make this determination before the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.[34]

31. The Department has determined that the cost of complying with the proposed rules in the first year after they take effect will not exceed $25,000 for any one small business or small city. The Department made this determination based upon the fact that the proposed rules affect school districts and county public health and human

[29] Minn. Stat. § 14.131.
[30] Minn. Stat. § 14.002.
[31] SONAR at 8.
[32] *Id*. at 9.
[33] Minn. Stat. § 14.127, subd. 1.
[34] Minn. Stat. § 14.127, subd. 2.

services agencies, not small businesses or small cities. The increased costs associated with the rules will be funded by federal, state, and local monies.[35]

32. The Administrative Law Judge finds that the agency has made the determination required by Minn. Stat. § 14.127 and approves that determination.

Rulemaking Legal Standards

33. Under Minn. Stat. § 14.14, subd. 2, and Minn. R. 1400.2100, a determination must be made in a rulemaking proceeding as to whether the agency has established the need for and reasonableness of the proposed rule by an affirmative presentation of facts. In support of a rule, an agency may rely on legislative facts, namely general facts concerning questions of law, policy and discretion, or it may simply rely on interpretation of a statute, or stated policy preferences.[36] The Department prepared a Statement of Need and Reasonableness (SONAR) in support of the proposed rules. At the hearing, the Department primarily relied upon the SONAR as its affirmative presentation of need and reasonableness for the proposed amendments. The SONAR was supplemented by comments made by the Department's panel at the public hearing and in a written post-hearing submission.

34. Newly-promulgated rules are reasonable if they are: (1) within the delegated authority of the agency;[37] (2) rationally related to the end sought to be achieved by the governing statute;[38] and (3) adequately grounded in the facts and circumstances set forth in the rulemaking record.[39]

35. The question of whether a rule has been shown to be reasonable focuses on whether it has been shown to have a rational basis, or whether it is arbitrary, based upon the rulemaking record.[40] Arbitrary or unreasonable agency action is action without consideration and in disregard of the facts and circumstances of the case.[41] A rule is generally found to be reasonable if it is rationally related to the end sought to be achieved by the governing statute.[42] The Minnesota Supreme Court has further defined an agency's burden in adopting rules by requiring it to "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken."[43]

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[35] SONAR at 9-10.
[36] *Mammenga v. Department of Human Services*, 442 N.W.2d 786 (Minn. 1989); *Manufactured Housing Institute v. Pettersen*, 347 N.W.2d 238, 244 (Minn. 1984).
[37] In re *Hanson*, 275 N.W.2d 790 (Minn. 1978); *Hurley v. Chaffee*, 43 N.W.2d 281, 284 (Minn. 1950).
[38] *Mammenga*, 442 N.W.2d at 789-90; *Broen Memorial Home v. Department of Human Services*, 364 N.W.2d 436, 444 (Minn. Ct. App. 1985).
[39] *See, generally, Federal Security Administrator v. Quaker Oats Co.*, 318 U.S. 218, 233 (1943); *Greenhill v. Bailey*, 519 F.2d 5, 19 (8th Cir. 1975).
[40] *Minn. Chamber of Commerce v. Minn. Pollution Control Agency*, 469 N.W.2d 100, 103 (Minn. App. 1991); *Manufactured Housing Institute v. Pettersen*, 347 N.W.2d 238, 240 (Minn. 1984).
[41] *St. Paul Area Chamber of Commerce v. Minn. Public Service Commission*, 312 Minn. 250, 260-61, 251 N.W.2d 350, 357-58 (1977).
[42] *Mammenga*, 442 N.W.2d at 789-90; *Broen Memorial Home v. Minn. Dept. of Human Services*, 364 N.W.2d 436, 444 (Minn. App. 1985).
[43] *Manufactured Housing Institute,* 347 N.W.2d at 244.

36. Reasonable minds might be divided about the wisdom of a certain course of action. An agency is legally entitled to make choices between possible approaches so long as its choice is rational.[44] It is not the role of the Administrative Law Judge to determine which of several possible policy alternatives presents the "best" approach, since this would invade the policy-making discretion of the agency. The question is, rather, whether the choice made by the agency is one that a rational person could have made.[45]

37. In addition to need and reasonableness, the Administrative Law Judge must also assess other factors; namely: whether the agency has complied with rule adoption procedures; whether the rule grants undue discretion; whether the Department has statutory authority to adopt the rule; whether the rule is unconstitutional or illegal; whether the rule constitutes an undue delegation of authority to another entity; or whether the proposed language does not meet the statutory requirements for a rule.[46]

38. In this proceeding, the Department has proposed additional changes to its rules after the proposed rules were published in the State Register. Accordingly, it is necessary for the Administrative Law Judge to make a determination regarding whether the new language is substantially different from that which was originally proposed.[47]

39. The standards to determine if new language is substantially different are found in Minn. Stat. § 14.05, subd. 2. The statute specifies that a modification does not make a proposed rule substantially different if "the differences are within the scope of the matter announced … in the notice of hearing and are in character with the issues raised in that notice," the differences "are a logical outgrowth of the contents of the … notice of hearing and the comments submitted in response to the notice," and the notice of hearing "provided fair warning that the outcome of that rulemaking proceeding could be the rule in question."

40. In determining whether modifications make the rules substantially different, the Administrative Law Judge is to consider whether "persons who will be affected by the rule should have understood that the rulemaking proceeding … could affect their interests," whether "the subject matter of the rule or issues determined by the rule are different from the subject matter or issues contained in the … notice of hearing," and whether "the effects of the rule differ from the effects of the proposed rule contained in the … notice of hearing."[48]

41. Any substantive language that differs from the rules as published in the State Register has been assessed to determine whether the language is substantially different. Because some of these changes are not weighty or controversial, they are not separately set forth below. Any change that is not separately referenced below is found to be not substantially different from the rules as published in the State Register.

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[44] *Peterson v. Minn. Dept. of Labor & Industry*, 591 N.W.2d 76, 78 (Minn. App. 1999).
[45] *Minn. Chamber of Commerce*, 469 N.W.2d at 103.
[46] Minn. R. 1400.2100.
[47] Minn. Stat. § 14.15, subd. 3, and 14.05, subd. 2.
[48] Minn. Stat. § 14.05, subd. 2.

Analysis of the Proposed Rules

General

42. This report focuses upon the portions of the proposed rules that received significant comment and require a detailed examination. Because some sections of the proposed rules were not opposed and were adequately supported by the SONAR, a detailed discussion of each section of the proposed rules is unnecessary.

43. The Administrative Law Judge finds that the Department has demonstrated, by an affirmative presentation of facts, the need for and reasonableness of all rule provisions not specifically discussed in this Report. The Administrative Law Judge also finds that the Department has statutory authority to adopt those portions of the proposed rules and there are no other deficiencies that would prevent their adoption.

Discussion of Proposed Rules

44. The Department of Health and the Department of Human Services both support the proposed rules.[49] Many of the organizations and individuals who commented on the proposed rules commended the Department of Education for undertaking the revision of the rules and stressed the value of the cooperative interagency effort in formulating the proposed rules. Several of them expressed the belief that the rules will provide more tracking of developmental concerns and provide the intervention needed to support children who are at risk or demonstrate mild delays. In addition, some of these parties speculate that children who receive early intervention services may not need to be served in more expensive K-12 special education programs, or at least will require less intensive services.[50] Although some of those commenting on the proposed rules criticized the delay in promulgation of the rules and emphasized that some children who should have been identified in 2004 as eligible under Part C have now "aged out" of Part C programming, they also complimented the thoroughness of the current rulemaking efforts.[51]

45. Judy Swett, Early Childhood Coordinator for PACER, testified that PACER supports the Department's efforts to revise eligibility criteria for children ages birth through two, the inclusion of evaluation requirements in the proposed rules, and the clarification of roles and responsibilities with respect to transition.[52] Duane Borgeson on behalf of the Minnesota Administrators for Special Education (MACE) expressed support for the proposed rules to the extent that they do not exceed federal requirements.[53] Several persons expressed support for the Department's decision to reject the "two-door" approach and to separate the criteria for birth through age two and

[49] Transcript of Hearing at 27, 29, 31.
[50] *See, e.g.,* comments from Chris Bentley of the Fraser School and Cindy Croft of the Center for Inclusive Child Care.
[51] *See, e.g.,* comments from Daniel Stewart of the Minnesota Disability Law Center.
[52] Transcript of Hearing at 54-56.
[53] Transcript of Hearing at 44-45.

age three through six.[54] Although several commentators suggested revisions in the proposed rules, most of the comments submitted seek to "fine tune" the language of the rules rather than pose broad challenges to the approaches reflected in the proposed rules.

46. Comments received regarding specific provisions of the proposed rules are discussed below.

Rule Part 3525.1350 – Infant and Toddler Intervention Services

Subpart 1. Services required.

47. This subpart of the existing rules generally requires that early childhood special education must be available to pupils from birth to seven years of age who have a substantial delay or disorder in development or have an identifiable sensory, physical, mental, or social/emotional condition or impairment known to hinder normal development and need special education. The current rule provides early intervention services to children who have an overall developmental delay and to children with a medically-diagnosed syndrome or condition that hinders normal development *only if* those children demonstrate a need for special education services.

48. Consistent with its efforts in this rulemaking proceeding to comply with federal requirements and also separate the rules relating to services available under Part C to infants and toddlers from birth through two from those relating to services available under Part B to children three through six, the Department proposes the following changes to subpart 1:

> **~~Definition.~~ Services required.** ~~Early childhood special education~~ Infant and toddler intervention services under United States Code, title 20, chapter 33, sections 1431, et seq., and Code of Federal Regulations, title 34, part 303, must be available to ~~pupils~~ children from birth ~~to seven years of age who have a substantial delay or disorder in development or have an identifiable sensory, physical, mental, or social/emotional condition or impairment known to hinder normal development and need special education~~ through two years of age who meet the criteria described in subpart 2.

49. The Department asserts that children who meet the existing eligibility criteria will continue to be eligible, but the changes made to this subpart will expand the eligibility criteria to encompass additional children. The amendments will ensure that children who have a developmental delay in at least one area of development or have a medically diagnosed syndrome or condition that has a high probability of resulting in development delay will qualify for services, regardless of whether the child has demonstrated a need for services. The Department has proposed the amendments to subpart 1 to meet the requirements of federal law, as interpreted by OSEP, and to improve the clarity of the rule.

[54] See, e.g., Transcript of Hearing at 41-42 (comments of Linda Bonney, Legal Advocate for the Minnesota Disability Law Center).

50. The Minnesota School Boards Association took issue with the Department's use of the phrase "infant and toddler intervention services," arguing that the term is not defined in the rules and is inconsistent with IDEA language referring to "early intervention services." The School Boards Association asserts that Minnesota Statutes currently utilize the phrase "early intervention services" and that inconsistency between federal laws and regulations and state laws and regulations will be highly confusing to those regulated by the proposed rules.[55]

51. The Department explained in the SONAR and in its post-hearing submission that it used the phrase "infant and toddler intervention services" rather than "early childhood special education" or "early intervention services" in the proposed rules to reduce confusion and emphasize the distinction between Part C (infant and toddler) and Part B (ages 3-6) services. The Department pointed out that the IDEA refers to "early intervening services" for students in grades kindergarten through 12 and "early intervention services" for infants and toddlers under Part C, and believes that the similarities in these terms have caused considerable confusion.[56]

52. The School Boards Association also objected to the Department's proposal to define "infant and toddler interventions services" as being *through two years of age,* and emphasized that the IDEA defines an infant or toddler with a disability as "an individual *under three years of age*." Therefore, the School Boards Association recommended that the "through two years of age" language be replaced throughout the proposed rule with "under three years of age" to maintain consistency with IDEA.[57]

53. In its post-hearing submission, the Department declined to make the suggested modification to the proposed rules. It stated that the direct citation to the federal law within the text of the proposed rule is sufficient to eliminate or reduce any confusion created by its use of slightly different language than that contained in the IDEA. Moreover, the Department contends that the phrase it has chosen to use in the proposed rules merely states the same concept in a slightly different manner, and does not change the meaning of the requirement.[58]

54. Linda Bonney, Legal Advocate, and Daniel Stewart, Supervising Attorney for the Minnesota Disability Law Center, proposed that the language of proposed subpart 1 be modified to include references to Minnesota Statutes, as follows:

> Infant and toddler intervention services under United State Code, title 20, chapter 33, sections 1431 et seq., and Code of Federal Regulations, title 34, part 303 and the infant and toddler early intervention system under Minnesota Statutes, sections 125A.023, 125A.027 and 125A.259- .45 must be available to children who meet the criteria described in subpart 2.[59]

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[55] Comment dated June 4, 2007, and submitted by Peter Martin of Knutson, Flynn & Deans, P.A. (hereinafter MSBA comment).
[56] SONAR at 11-12; Department's Post-Hearing Submission at 2.
[57] *Id.* at 1-2.
[58] Department Post-Hearing Submission dated June 14, 2007, at 2-3.
[59] Comment dated June 6, 2007, submitted by Dan Stewart of the Minnesota Disability Law Center (MDLC); Hearing Transcript at 403, 45-47.

The Disability Law Center suggested this modification based upon concerns that, unless state statutory requirements were referenced in subpart 1, schools will incorrectly understand and assert that their responsibility begins and ends with federal law. In its comments, the Disability Law Center identified several matters that are addressed by Minnesota law but are not fully contained in federal law.[60] Jacki McCormack, Senior Advocate, Arc Greater Twin Cities, supported the comments of the Disability Law Center.[61]

55. During the hearing, Marty Smith, the Department's Statewide Coordinator for the Infant and Toddler Intervention Program, responded to questions raised by Mr. Stewart by indicating that children eligible for Part C services would also continue to be eligible for services under Minnesota law such as core early intervention services under Minn. Stat. § 125A.27, service coordination under 125A.33, and respite services under 125A.34. Ms. Smith indicated that she would want to add the references to Minnesota Statutes into the proposed rules.[62] However, in its post-hearing submission, the Department declined to revise the rule as requested "because the primary purpose of these rules is to ensure compliance with federal law. To the extent that the state statutes referenced above clarify and establish procedures for the implementation of Part C in Minnesota, it is not necessary or advisable to repeat them in these rules."[63]

56. The Administrative Law Judge finds that the rules as proposed have been shown to be needed and reasonable. The Department has shown that use of the phrase "infant and toddler intervention services" is reasonable and will avoid confusion. Although the Department may, if it wishes, choose to modify the proposed rules to more closely follow the federal definition by referring to eligible children as being "under three," it is evident that the language in the proposed rules specifying that children are eligible for such services "through two years of age" is permissible because it means the same thing. Although the proposed rules are not rendered unreasonable by virtue of their failure to explicitly refer to applicable Minnesota Statutes, the Department may wish to consider including those references to provide additional guidance to the regulated public. If the Department elects to refer to children "under three" or to include the references to Minnesota Statutes suggested by the MDLC and Arc, those modifications would not result in a rule that is substantially different from the rule as originally proposed.

Subpart 2. Criteria for birth through two years of age.

57. The proposed amendments to subpart 2 establish the new eligibility criteria for receiving Part C-related services. The proposed amendments delete the existing criteria for developmental delay found at subpart 2(B)(1)-(2) and (B)(2), which require infants and toddlers to demonstrate that they (1) have a medical condition or syndrome known to hinder normal development, *and* demonstrate a need for services; (2) have an *overall* developmental delay, *and* demonstrate a need for services; or (3) for

[60] MDLC comment at 3.
[61] Comment dated June 7, 2007, submitted by Jacki McCormack of Arc.
[62] Hearing Transcript at 46-47.
[63] Department's Post-Hearing Submission at 7.

infants 18 months of age or younger, have a physical delay, *and* demonstrate a need for services.[64] According to the Department, these proposed changes will bring Minnesota into compliance with the 2004 amendments to the IDEA so that federal Part C-related funding can continue as indicated by OSEP.

58. The proposed language for subpart 2 is as follows:[65]

Criteria for birth through two years of age. The team shall determine that a child from birth through the age of two years ~~and 11 months~~ is eligible for ~~early childhood special education~~ infant and toddler intervention services if:

A. the child meets the criteria of one of the disability categories in United States Code, title 20, chapter 33, sections 1400 et seq., as defined in Minnesota Rules; or

B. the child meets one of the criteria for developmental delay in subitem (1) ~~and~~ or the criteria in ~~subitems~~ subitem (2) ~~and (3)~~:

(1) the child has a diagnosed physical or mental condition **or disorder** that has a high probability of resulting in developmental delay regardless of whether the child has a demonstrated need or delay; or

(2) the child is experiencing a developmental delay that is demonstrated by a score of 1.5 standard deviations or more below the mean, as measured by the appropriate diagnostic measures and procedures, in one or more of the following areas;

(a) cognitive development;

(b) physical development, including vision and hearing;

(c) communication development;

(d) social or emotional development; and

(e) adaptive development.[66]

59. It must be noted that, in the SONAR, the Department quoted a slightly different version of this portion of the proposed rules that specifically referred to the "IFSP team" making the eligibility determination.[67] The proposed rules as certified by the Revisor of Statutes do not contain the reference to "IFSP" (Individual Family Service Plan). The Department expressed at the hearing that the Revisor made a few "technical" changes to the proposed rule language that were not referenced in the SONAR, and indicated generally that it supports the Revisor's draft. If the deletion of the reference to IFSP team was an inadvertent oversight in the Revisor's draft, the

[64] SONAR at 13.
[65] Hearing Transcript at 34.
[66] The stricken portions of the rule text are not included here. See Revisor's rule draft dated April 23, 2007, for complete version of subpart 2.
[67] SONAR at 12-13.

Department may, if it wishes, modify the proposed rules to include that phrase. Such a modification would not constitute a substantial change in the proposed rules.

60. At the hearing, the Department indicated that it wished to add the phrase "or disorder" (in boldface type above) to item B(1). The Department argued that the addition of this phrase serves to clarify for all providers the scope of the diagnoses that can satisfy these eligibility criteria. In particular, the Department states that the phrase will be important during the "child find" stage, when children who may be eligible for infant and toddler services are being identified by physicians and other health care providers. The Department asserts that the same diagnoses that are termed "conditions" in educational services are often termed "disorders" by the medical community.[68] The Administrative Law Judge finds that the addition of the phrase "or disorder" is needed and reasonable and does not make the proposed rules substantially different than originally published in the State Register.

61. The Minnesota School Boards Association objected to the language of item A because it contains the federal citation to Part B and could cause confusion about whether Part C or Part B applies to children birth through the age of two.[69] With respect to item B(1), the Association disagreed with the inclusion of the phrase "regardless of whether the child has a demonstrated need or delay" in the proposed rules because that same language does not appear in IDEA and could be perceived as a different standard from federal law.

62. The Department responded that the proposed rules do not reflect an extension of eligibility because the Part B categorical disability criteria as a measure of eligibility for Part C programs and services have always existed in Minn. R. 3525.1350. The Department indicated that "Minnesota, in establishing its Part C program, always intended to serve infants and toddlers who qualify under the categorical disabilities of Part B." The Department declined to change this requirement because that would change the original intent of the State's program of ensuring that these children receive services which are more specific to their disability. The Department believes that its proposed language will ensure better compliance with IDEA and that it does not exceed the federal standard. Moreover, according to the Department, deleting the phrase "regardless of whether the child has a demonstrated need or delay" from the proposed rules might jeopardize Minnesota's compliance with federal law because the existing rule provision requiring a demonstrated need or delay was one of the primary issues raised by OSEP when it directed Minnesota to revise its criteria.[70]

63. The Interagency Early Intervention Committees (IEIC) of St. Paul and North Suburban Ramsey County objected to subpart 2, item B, subitem 1, asserting that there is not sufficient information available for the Early Intervention personnel to make an eligibility determination in the case of conditions with a high probability of resulting in developmental delay. While the IEICs praised the Department of Health's efforts in providing technical assistance for clarifying *physical* conditions with a high probability of developmental delay, the IEICs expressed concern about identifying and defining

[68] Ex. 10.
[69] Minnesota School Boards Association comment at 2.
[70] Department's Post-Hearing Submission at 8.

mental conditions that have a high probability of resulting in developmental delay. Specifically, the Committees suggested that the subitem be clarified by including a description of the process to be used to determine whether a condition has a high probability of resulting in developmental delay.[71]

64. Additionally, the St. Paul and North Suburban Ramsey County IEICs commented that it was not clear to them why vision and hearing were included in the areas of developmental delay because they are not measured using standard score delay and are already addressed in subpart 2, item A. The IEICs recommend removing the clause "including vision and hearing" from subpart 2, item B, subitem (b) of the proposed rules (as well as a later reference in subpart 3).[72]

65. At the hearing and in the Department's post-hearing submission, the Department responded to the IEICs' comments by emphasizing that the proposed rule language is based on federal requirements that sufficiently establish the boundaries for the types of diagnosed conditions, physical and mental, that have a high probability of resulting in developmental delay. The Department contends that there is agreement within the medical, developmental delay research, and intervention communities about the disorders and conditions that have a high probability of resulting in delay.[73] The Department pointed out that the notes to the applicable federal regulations include examples of such conditions,[74] and indicated that it was hesitant to create a highly specific list of examples in the proposed rules that might either create concern regarding legitimate situations that are not on the list or cause readers to assume that the list was exhaustive and conditions not specifically mentioned would not qualify. It also stressed that it is not feasible to set forth a list of conditions in the rules because new conditions emerge and developmental outcomes fluctuate due to advances in medicine and technology. The Department states that it, along with the Departments of Health and Human Services, will develop guidance materials for use by the public when the proposed rule provision is adopted.[75]

66. As for the IEICs' recommendation to remove the clause "including vision and hearing" from subpart 2, item B(2)(b), the Department declines to do so because vision and hearing are specifically listed after Physical Development in the federal regulations, and the Department's intent, in accordance with OSEP's directive, is to align its rules with the federal law.[76] According to the Department, although vision and hearing are included in the categorical disability criteria, the level of required impairment is different.[77]

67. The Administrative Law Judge finds that the Department has shown that the changes proposed to subpart 2 are both reasonable and necessary to conform to federal requirements.

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[71] Comment dated May 31, 2007, submitted by Tina Lavin and Ruth Paisley of the St. Paul and North Suburban Ramsey County IEICs.
[72] *Id.*
[73] SONAR at 15.
[74] 34 C.F.R. § 303.16, Note 1.
[75] Hearing Transcript at 17-19; Department's Post-Hearing Submission at 8-9.
[76] 34 C.F.R. § 303.16(a)(1)(ii).
[77] Department's Post-Hearing Submission at 9.

Subpart 3. Criteria for three through six years of age (moved under Proposed Rules to New Rule Part 3525.1351)

68. The current subpart 3 establishes the criteria for special education eligibility for children three through six years of age. The content of this subpart is largely unchanged and is proposed to be renumbered as Minn. R. 3525.1351 so that the two age ranges (0-2, Part C and 3-6, Part B) are clearly separate and distinct.[78] Some of the new language being proposed mirrors that proposed in subpart 2.

69. The Minnesota Disability Law Center suggested the following change to subpart 3, item A to make subpart 2, item A, and subpart 3, item A identical, so as to avoid confusion in the interpretation of the two rules:

> A. ~~the child meets the criteria of one of the categorical disabilities~~ the child meets one of the disability categories in United States Code, title 20, chapter 33, sections 1400 et seq., as defined in Minnesota Rules . . . .

The Department has indicated that it will make this proposed change as recommended by the Disability Law Center.[79] The Administrative Law Judge finds that this change is needed and reasonable and does not make the proposed rules substantially different than the rules as originally published in the State Register.

70. For children ages three through six to achieve and maintain eligibility under the rules, the child's need for special education must be supported by a number of factors. One of those factors, parent reports, is proposed for deletion by the Department at subpart 3, item B(2)(c). Arc of the Greater Twin Cities and the St. Paul and North Suburban Ramsey County IEICs objected to deleting the reference to parent reports from that portion of the rules. Both organizations maintain that parent reports and interviews are necessary components of the evaluation process for Part C and Part B funding.[80] Arc emphasized that some children are not responsive or uncooperative when being evaluated by professionals and that the only way to get a clear picture of the child's overall development is by parent report.

71. The Department declined to modify the rule language based on these suggestions. It indicated in its post-hearing submission that the federal law and regulations clearly outline the involvement of parents as members of the child's Individual Family Service Plan (IFSP) team,[81] but do not include "parent report" as one of the elements that must be included in an evaluation.[82] Because parent reporting is already an important part of the *collaborative* process under 34 C.F.R. § 303.321(d)(3)(iii), the Department explained that it does not believe that it needs to be included in the discussion of the *evaluation* process.[83]

72. The Department has demonstrated a rational basis for its proposed changes to subpart 3, and the Administrative Law Judge finds that the changes to

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[78] SONAR at 17.
[79] Department's Post-Hearing Submission at 9.
[80] Arc comment dated June 7, 2007, and IEIC comments dated May 31, 2007.
[81] *See* 20 U.S.C. §§ 1436(a)(3) and (b); 34 C.F.R. § 303.343.
[82] 34 C.F.R. § 303.322.
[83] Department's Post-Hearing Submission at 10.

subpart 3 have been shown to be needed and reasonable. While the Department may, if it wishes, choose to reinstate the reference to "parent report" in this provision without creating a substantial change in the proposed rules, the rules are not rendered unreasonable or unnecessary by their failure to include this reference.

Subpart 4. Evaluation.

73. The Department proposes to add a new subpart 4 to the proposed rules to cover the evaluation requirements to demonstrate delay referenced in subpart 2, item B(1)(b) and (c). The language used in subpart 4 largely parallels the language used in federal regulation to emphasize to Minnesota school districts and local social service and public health agencies the need for a thorough evaluation that includes all of the relevant components.[84]

74. The Minnesota School Boards Association objected to the fact that the Department did not use the federal language verbatim when it drafted proposed subpart 4. For example, Association points out that the Department's proposed item A requires that the evaluation include "a review of the child's current records related to health status and medical history," while the federal IDEA regulations on which the Department's language is based require "a review of pertinent records related to the child's current health status and medical history." The Association similarly argued that proposed item B should be revised to conform precisely to the language of the IDEA.[85]

75. The Department responded that item A of the proposed rules was intended to underscore that the local team should review the child's current health status and medical history records and determine what is pertinent using its collective professional judgment. It does not want a physician's office or other record provider to have control over the determination of what constitutes "pertinent" records. The Department believes that this accurately reflects the intent of the federal law. With respect to item B, the Department asserted that its language is substantially similar to the federal language and could not be interpreted to establish a different standard from that contained in federal law. Accordingly, it declined to modify the language of the proposed rules.[86]

76. With respect to item C, the School Boards Association suggested that the proposed rules be revised to require that the evaluation include "an assessment of the unique needs of the child in terms of each of the developmental areas in item B, including the identification of services appropriate to meet those needs." The Association indicated that this amendment would make the language of the proposed rules language mirror that of the federal regulations.[87] The Department declined to make the suggested change. It responded that it interpreted the federal language to mean that the child's IFSP team should determine in the process of developing the child's service plan what the appropriate services are to meet the child's needs, and

[84] SONAR at 21. *See also* 20 U.S.C. § 1435 (a)(3) and 34 C.F.R. § 303.322.
[85] Minnesota School Boards Association (MSBA) comments at 4-5.
[86] Department's Post-Hearing Submission at 12.
[87] MSBA comments at 4.

does not believe that that determination should be made in isolation by individuals who are completing the evaluation of the child.[88]

77. Finally, the School Boards Association recommended that item D (which requires the evaluation to include "at least one documented, systematic observation in the child's daily routine setting by an appropriate professional or, if observation in the daily setting is not possible, the alternative setting must be justified") be deleted because the language is not found in IDEA, and therefore does not parallel IDEA as stated by the Department.[89] The Department declined to delete this language. It indicated in its post-hearing response that this language is contained in the current rule and input from the field during the informal comment period revealed that practitioners felt that it is a critical part of the evaluation. The Department explained that observation of an infant or toddler in her or her typical environment is necessary since developmental status is best observed in circumstances that are familiar to the child. In the Department's view, the observation provides corroborating information with respect to standardized assessment, especially in situations where the tests and results may not be applicable. The Department does not want to delineate the "appropriate professional" who may conduct the observation because it believes that this should be determined by the local education agency in each individual situation.[90]

78. Both the Minnesota Disability Law Center and the School Boards Association raised the issue of the timing of the evaluation. The Department's proposed language does not specify *when* the evaluation must be completed, and both of the organizations urged that the Department specify that the evaluation must be completed either within 45 days in accordance with federal requirements or within 30 school days in accordance with Minnesota rules. The Disability Law Center also recommended adding a reference to Minn. R. 3525.2710 to the text of the proposed rules to ensure that school districts follow the requirements of comprehensive evaluations when evaluating infants and toddlers for eligibility.[91]

79. Based on the comments regarding the evaluation timeline, the Department seeks to modify the language of the proposed rules as follows:

> **Evaluation.** The evaluation used to determine whether a child is eligible for infant and toddler intervention services must be conducted within 45 calendar days after a referral is received. It must be based on informed clinical opinion . . . ."[92]

The Department declined, however, to add a reference to Minn. R. 3525.2710, because it contends that the federal Part C laws and regulations contain their own definition and standards related to evaluation, and it would be confusing and perhaps contrary to

[88] Department's Post-Hearing Submission at 12.
[89] MSBA comments at 4-5.
[90] SONAR at 13.
[91] *Id.* at 4; MDLC comments at 5.
[92] Department Post-Hearing Submission at 11.

federal law for the Department to refer to state rules relating to evaluation procedures for Part B.[93]

80. The Administrative Law Judge finds that the Department has shown a rational basis for its proposed language and that the proposed rules have been demonstrated to be needed and reasonable. The Department has expressed logical explanations for its slight deviations from federal language, and it is within the Department's discretion to make these word choices. As to the addition of the language involving the 45-calendar day timeline, the Administrative Law Judge agrees with the Department's assertion that the change is needed and reasonable to clarify the timeframe during which the evaluation must be conducted, and that it does not constitute a substantial change to the proposed rule as published in the State Register.

Subpart 5. Transition.

81. In subpart 5 of the proposed rules, the Department includes all new rule language that addresses the transition of infant and toddlers out of Part C-related services as they approach the age of three. At this point in time, a child's eligibility for Part B early childhood special education must be determined. Some children (such as those who have been served under the expanded criteria) will not qualify for Part B-related services, while others will meet the Part B criteria and will continue in early childhood special education under Part B programs. All children will need to transition from early intervention services to early childhood special education services or to appropriate community-based services.[94]

82. Transition from Part C services to Part B services has always been required by federal law, but because Minnesota's current eligibility criteria are identical for both Part C and Part B,[95] Minnesota providers previously have not needed to handle some aspects of transition with respect to three-year-olds. Instead, transition services have tended to occur when a child moves to a new provider or setting rather than as the child approaches his or her third birthday. The Department included the proposed new subpart addressing transition to draw attention to this significant change and make it clear that transition services at this stage are important and required by federal law.[96]

83. In its SONAR, the Department indicated that all of the provisions of proposed subpart 5 are required under the federal Part C program, including the participation of families. At the suggestion of the Departments of Health and Human Services, the Department also included language in the proposed subpart requiring that community-based service providers be included in the conference between the family and the local education agency. The Department stated that this requirement is derived

[93] *Id.* It is noted, however, that Minn. R. 3525.0210 specifies that terms used in parts 3525.0210 to 3525.4770 have the meanings given in that part, and the term "evaluation" is defined in subpart 18 of that rule to mean "an appropriate individual educational evaluation of a pupil's performance or development conducted by appropriately licensed personnel according to recognized professional standards, parts 3525.2550 and 3525.2710."
[94] SONAR at 23.
[95] Section 619 of the IDEA.
[96] SONAR at 23.

from the federal law and is especially important for those children who will not receive Part B services after exiting the Part C program.[97]

84. The initial paragraph of subpart 5 requires the service coordinator to facilitate transition before the child's third birthday. Item A describes the process that the service coordinator must follow for those children "who may be eligible" for early childhood special education. Item B addresses the service coordinator's responsibilities for children "who may not be eligible" for early childhood special education.

85. The School Boards Association expressed concern that the term "service coordinator" was not defined in the proposed rules.[98] In response to that concern, the Department indicated that the definition of "service coordinator" found at Minn. Stat. § 125A.33(a)(7) was a sufficient description of those duties, and agreed to amend the language of the proposed rules as follows: "The service coordinator provided for in Minnesota Statutes must facilitate transition from infant and toddler intervention services before the child's third birthday."[99] The Administrative Law Judge agrees that this proposed change is needed and reasonable and does not constitute a substantial change from the rules as published in the State Register. Although it is not a defect in the proposed rules to include merely a general reference to Minnesota Statutes, the Judge suggests that the amended portion of the rule refer specifically to the definition contained in Minnesota Statutes, Section 125A.33. The modification proposed by the Department and the revision suggested by the Administrative Law Judge do not result in the final rules being substantially different than the rules as originally proposed.

86. The School Boards Association also pointed out that the phrase "early childhood special education" is not defined in IDEA or in state law and proposed that the phrase be deleted in favor of the language "under Part B of the IDEA."[100] In response, the Department contended that the phrase is commonly used by practitioners in the field but agreed that the phrase is not defined in federal or state law and that the language of subpart 5 should be modified to be consistent with those laws. While it did not modify the proposed rules in the fashion proposed by the School Boards Association, the Department did propose to merely refer to "special education" throughout subpart 5 rather than to "early childhood special education" in order to make the rule more accurate.[101] The Administrative Law Judge agrees and finds that the proposed modification of this phrase in subpart 5 has been shown to be needed and reasonable. The modification does not make subpart 5 substantially different from the rules as originally published in the State Register.

87. As proposed, the language of subpart 5, item B states that the service coordinator must, "with the approval of the family, *take reasonable steps* to convene a conference." The School Boards Association suggested that the Department amend this language to conform exactly to the language used in the IDEA by stating that the service coordinator must, "with the approval of the family, *make reasonable efforts* to

[97] SONAR at 23-24. *See* 20 U.S.C. §§ 1436(b) and (d)(8); 20 U.S.C. § 1437(9)(a); 34 C.F.R. § 303.148; 34 C.F.R. § 303.344(h).
[98] MSBA comments at 5-6.
[99] Department's Post-Hearing Submission at 13.
[100] MSBA comments at 6.
[101] Department Post-Hearing Submission at 14.

convene a conference."[102] The Department declined to make this change because it believes that the language of the proposed rules is substantially similar to the federal language. The Department stated in its post-hearing comments that its staff decided that "the more active language contained in the proposed rule will make it clearer to practitioners that the requirement in both federal regulation and state rule calls for affirmative action to be taken toward convening a conference."[103] The Department has provided a sufficient showing of the need and reasonableness of this portion of the proposed rules.

88. Jane Roundtree, Program Supervisor for the Early Childhood Special Education Program of Anoka-Hennepin School District, Jill Haak, Coordinator for Special Education with the Benton-Stearns Educational District, and Cindy Schultz, a special education teacher in New Ulm, recommended that, when an initial Part C evaluation occurs within nine months of the child's third birthday, the evaluation should address eligibility criteria from both Parts C and B to eliminate the need for an additional evaluation within a short period of time.[104] The Department responded that it could not make a change of this type to the proposed language because the Part C evaluation cannot substitute for the Part B evaluation. But the Department did indicate that it will develop guidance materials regarding the appropriate use of existing evaluation findings and other relevant documentation from Part C eligibility determinations that can be applied to Part B evaluations and determinations.[105]

89. Both the Disability Law Center and the St. Paul and North Suburban Ramsey County IEICs objected to the Department's use of "*may* be eligible" and "*may not* be eligible." Both groups said that the proposed language suggests that a child's eligibility for Part B services has not yet been determined prior to the convening of a conference under item A or item B, and they propose to amend the phrases to "who *is* eligible" and "who *is not* eligible" to clarify that eligibility has already been determined at the time the conference is convened.[106] The Disability Law Center also expressed concern that the proposed language did not state who or what entity would make the determination of potential eligibility. The IEICs questioned whether there are due process requirements that should be explained in the proposed rule.

90. The Department declined to make the modification suggested by the Disability Law Center and the IEICs because the language "who may be eligible" and "who may not be eligible" is taken directly from the federal regulations at 34 C.F.R. § 303.148. The Department emphasized that eligibility for Part B is governed by separate rules and laws and that the Part C system must complete transition according to Part C requirements even though another system will make the ultimate determination regarding future eligibility. The Department noted that, while in many instances a single individual in Minnesota local educational agencies provides both Part C and Part B services, some school districts have different evaluation and service teams for Parts B and C. The Department stated that the Part B eligibility

[102] MSBA comments at 6-7.
[103] Department's Post-Hearing Submission at 14.
[104] *See* Hearing Transcript at 36-38; Public Ex. 15; and Comments of Cindy Schultz dated May 14, 2007.
[105] Department's Post-Hearing Submission at 15.
[106] Comments of MDLC dated June 6, 2007, at 5-6; Comments of IEICs dated May 31, 2007.

determinations are not subsumed with the Part C system, and that a referral to Part B is required for the eligibility determination to be made and to provide parents their due process rights under Part B.[107]

91. The Administrative Law Judge concludes that the Department has provided a sufficient justification for the language of the proposed rules to support a finding of need and reasonableness, particularly since the proposed rules echo the language of current federal rules. However, the Administrative Law Judge recommends that the Department consider adding further clarification to these or other rules regarding the eligibility determination process in connection with its broader rulemaking proceeding under Part 3525.

Funding Concerns

92. MACE and a number of others commenting on the proposed rules expressed concerns regarding the adequacy of funding for the implementation of the proposed rules and whether the Department has underestimated the number of children who will be served in the coming year.[108] Two comments questioned why the funding source was primarily through education, when children eligible under the expanded criteria will require interagency services.[109]

93. The Department responded that a primary component of the Part C requirements in IDEA is to ensure that providers make use of all existing resources to serve infants and toddlers who need Part C services, and state lead agencies are given the charge under 20 U.S.C. § 1431(b)(2) to "facilitate the coordination of payment for early intervention services from Federal, State, local and private sources (including public and private insurance)."[110] In addition, the Department must enter into "formal interagency agreements that define the financial responsibility of each agency for paying for early intervention services." The Department stated that it has complied with each of these federal directives through Minn. Stat. § 125A.29, and that local school districts have committed to work with local county social services and public health programs to deliver coordinated interagency services in accordance with children's IFSPs.[111]

94. Prior to the hearing, the Department projected future funding for general and special education aid as follows:

FY 2008	$1,794,000
FY 2009	$2,742,000
FY 2010	$3,993,000

[107] Department's Post-Hearing Submission at 14-15.
[108] *See, e.g.,* Written Comments of Vici L. Jernigan, Cindy Schultz, Tina Lavin, and Ruth Paisley; Hearing Transcript at 44-45 (Duane Borgeson on behalf of MACE) and 57-59 (Ann Bettenburg of Mounds View School District).
[109] Cindy Schultz's Comments dated May 14, 2007, and Vici L. Jernigan's Comments dated April 30, 2007.
[110] 20 U.S.C. § 1435(a)(10)(F); *see also* Department's Post-Hearing Submission at 5.
[111] Department's Post-Hearing Submission at 5.

FY 2011 $5,135,000.[112]

95. The Department explained that there are two funding streams for the services to be provided as a result of this rule. One is the general education funding formula, which is a pupil-driven funding mechanism that varies depending on the actual number of children served. The Department indicated that, if it has underestimated the number of children to be served under the proposed rules, the State has an open and standing appropriation that would adjust funding according to the numbers actually served. The second funding source is the special education funding formula.[113]

96. At the hearing, the Department reported that legislation passed in late May of 2007 would result in even more favorable funding. The Department indicated that the 2007 legislation changes the funding mechanism for special education services so that, starting with the 2007-2008 school year, funding will be based on current-year costs instead of the two-year delay between cost generation and funding reimbursement that existed prior to passage of this legislation. The new legislation includes an increase in the level of funding for special education services to reflect the projected increases in connection with the expansion of eligibility under Part C. It also provides for a 25 percent increase in the level of special education funding that would take effect in fiscal year 2008 and an additional 4 percent increase that would take effect in fiscal year 2009.[114]

97. The Department has demonstrated that the issue of funding has been carefully considered throughout the rulemaking process and has adequately addressed the concerns of interested individuals.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Department of Education gave proper notice of the hearing in this matter.

2. The Department has fulfilled the procedural requirements of Minn. Stat. § 14.14 and all other procedural requirements of law or rule.

3. The Department has demonstrated its statutory authority to adopt the proposed rules and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1, 14.15, and 14.50 (i) and (ii).

4. The Department has documented the need for and reasonableness of its proposed rules with an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 2, and 14.50 (iii).

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[112] Tr. at 23-24, 62-64; Ex. 11.
[113] Ex. 11. *See also* Department's Post-Hearing Submission at 4-5.
[114] *See* Laws of 2007, chapter 146, articles 3 and 11; Hearing Transcript at 23-24, 62-64; Department's Post-Hearing Submission at 5-6.

5. The additions and amendments to the proposed rules suggested by the Department after publication of the proposed rules in the State Register described in Findings 60, 69, 79, 85 and 86 are not substantially different from the proposed rules as published in the State Register within the meaning of Minn. Stat. § 14.05, subd. 2, and 14.15, subd. 3.

6. A Finding or Conclusion of need and reasonableness with respect to any particular rule, or part thereof, does not preclude (nor should it discourage) the Department from further modification of the proposed rules based upon an examination of the public comments, provided that the final rule adopted by the agency is based upon facts appearing in this rule hearing record.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the proposed rules be adopted.

Dated: July 16, 2007.

s/Barbara L. Neilson
BARBARA L. NEILSON
Administrative Law Judge

Reported: Court Reported by Kirby A. Kennedy & Associates;
Transcript Prepared (one volume).

NOTICE

The Department must make this Report available for review by anyone who wishes to review it for at least five working days before the Department takes any further action to adopt final rules or to modify or withdraw the proposed rules. If the Department makes changes in the rules other than those recommended in this report, it must submit the rules, along with the complete hearing record, to the Chief Administrative Law Judge for a review of those changes before it may adopt the rules in final form.

After adopting the final version of the rules, the Department must submit them to the Revisor of Statutes for a review of their form. If the Revisor of Statutes approves the form of the rules, she will submit certified copies to the Administrative Law Judge, who will then review them and file them with the Secretary of State. When they are filed with the Secretary of State, the Administrative Law Judge will notify the Department, and the Department will notify those persons who requested to be informed of their filing.